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JUSTIFICATIONS

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SUMMARY

International human rights are often criticized. Proponents of human rights usually have a hard time responding to critiques that bear on their justifications. They may say that human rights are self-justificatory or justified by being themselves justifications (for example, of the authority of domestic or international law), and hence do not regard them as being in need of justification. Human rights theorists do not necessarily fare any better: some human rights theories do not include the justification of human rights among their aims, while others justify human rights albeit without clarifying why justifications are needed in the first place or what they are actually justifying, thereby often talking at cross purposes with each other. This chapter purports to explain: first, why we need to justify human rights; second, what it means to justify them; third, what the different justifications for human rights may be; and, finally, what some of the implications of the justifications of human rights could be.

1 INTRODUCTION

International human rights law¹ has come under critique for quite some time now.² Curiously, however, proponents of human rights have not, by and large, responded to those critiques. Nor, more importantly, have they tried to justify human rights in the first place. This may be because they think human rights are self-justificatory,³ an irreducible value that is not in need of further justification, justified by being themselves justifications (for example, of the authority of domestic or international law), or justified by reference to another value that does not itself need justification (for example, dignity or equality).

¹ This chapter pertains to the justification of *international* human rights law. See on those two dimensions of human rights: Besson, 'The Law in Human Rights Theory' (2013) 7 *Zeitschrift für Menschenrechte—Journal for Human Rights* 120; Besson, 'Human Rights and Constitutional Law—Patterns of Mutual Validation and Legitimation' in Cruft, Liao, and Renzo (eds), *The Philosophical Foundations of Human Rights* (OUP, 2015) 279; Besson, 'Human Rights and Justification—A Reply to Matthias Kumm' in Etinson (ed), *Human Rights: Moral or Political?* (OUP, 2018).

² See Chapter 3.

³ This could be, for instance, because they are rights human beings have by virtue of their human nature and they hence find their justification in human nature itself. On the dangers of the naturalistic fallacy (that is, deriving an 'ought' from an 'is') in the human rights context, see, however, Beitz, *The Idea of Human Rights* (OUP, 2009) 49 ff.

Others have hinted at the need to agree on human rights without even asking why.⁴ These various positions come close to making human rights a matter of faith rather than of reason.⁵ And this in turn may explain why many human rights activists tend to see inquiries into the justification of human rights as quasi-blasphematory or, at the least, a waste of time and energy that would be better channelled towards working for and enforcing human rights in practice.

International human rights law is itself of no avail in this respect. It cannot provide justifications external to the law. Generally speaking, the law provides reasons for action that are independent of its content. Therefore, the justifications for its authority should not be identified with moral justifications for the content of legal norms. True, the justifications for the law's authority depend on those moral justifications and thus presume their existence. International human rights law is no exception. As a result, legal reasoning on human rights, like legal reasoning in general, is a special kind of moral reasoning. Human rights justifications and critiques are inherent to human rights legal reasoning just as justification and critique are inherent to the law in general. Interestingly, international human rights law does more than other international law in this respect as it refers expressly to the independent existence of various moral justifications for human rights. In particular, preambles to human rights instruments refer to concepts such as dignity, equality, or autonomy,⁶ and use foundational or derivational language.⁷ In short, international human rights law does not, itself, morally justify human rights and one should not expect it to do so. However, the way human rights law works and the manner in which its authority is justified do not only confirm the need to justify such rights, but also provide the institutional and deliberative space to do so.

The obvious place to turn to for justification then is human rights philosophy or theory. After all, justifying is what moral philosophers and philosophers of law do. Curiously, however, human rights theorists do not necessarily fare much better on this count.⁸ Of course, they disagree about the justifications of human rights, but that is not the problem. On the contrary, human rights are essentially contestable concepts, and so should their justifications be. Rather, the concern is that, while the majority of human rights theorists do justify human rights, they do so without clarifying why justifications are needed in the first place or what exactly they are justifying (for example, human rights *law* or human rights as either legal or moral rights or both),⁹ thereby often talking at cross purposes.¹⁰ This is a shame as a lot in human rights theory depends on the justification(s) given to human rights. For instance, their justification(s) affect the kind of guidance human rights

⁴ In 1949, after the adoption of the Universal Declaration on Human Rights, Jacques Maritain wrote: 'We agree about the rights but on condition that no one asks us why.' Maritain, *Man and the State* (Hollis and Carter, 1954) 70.

⁵ See Ignatieff, 'Human Rights: The Midlife Crisis' (1999) 46 *NY Review of Books* 58.

⁶ eg UDHR, ICCPR, and ICESCR, preambles.

⁷ eg ICESCR and ICCPR, preambles: '... recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world' [emphases added].

⁸ There are important exceptions. See eg Buchanan, 'Why International Legal Human Rights?' in Cruft, Liao, and Renzo (2015), 244 ff; Waldron, 'Is Dignity the Foundation of Human Rights?' (2013) *NYU School of Law, Public Law Research Paper No 12-73*.

⁹ eg Griffin, *On Human Rights* (OUP, 2008); Tasioulas, 'Are Human Rights Essentially Triggers for Intervention?' (2009) 4 *Philosophical Compass* 938; Wellman, *The Moral Dimensions of Human Rights* (OUP, 2011).

¹⁰ See Buchanan (2015); Buchanan and Sreenivasan, 'Taking International Legality Seriously: A Methodology for Human Rights' in Etinson (2017).

theory may give to human rights practice with respect to difficult questions such as the stringency of specific human rights duties, the resolution of conflicts between human rights or between human rights and other moral considerations, the allocation of human rights duties, or the prioritization among human rights duties.

Despite the importance of justification in human rights theory, it is important not to be too disappointed by the indeterminate state of the debate. One should not lose sight of the reverse impact of one's respective theoretical approach to the nature, object, or scope of human rights on their justification. Justifications may engage with human rights at very different levels depending on what one understands their nature and content to be. And those features of human rights work as constraints on potential justifications in return. For instance, endorsing the universality or generality of human rights conditions the kind of justifications that may be given to those rights if their scope is to be sufficiently universal or general. Furthermore, human rights are usually understood as giving rise to strong, if not exclusionary, duties, and this in turn affects the kind of justifications that may warrant such correlative duties. As a result, if it is true that the justifications of human rights and their role are indeterminate and contested, it should be a consolation to realize that so is the rest of human rights theory. All aspects of human rights need to be worked on at the same time to identify the right justifications of human rights.

As a matter of fact, and more generally, the way in which one approaches the nature and role of human rights *theory* itself also affects one's understanding of the *justification* of human rights, and vice-versa.¹¹ For instance, since arguably the best human rights theory ought to attempt to account for our contemporary human rights practice, the justification of human rights should also be about the point of our human rights practice. This in turn means looking for human rights justifications in the normative practice of human rights themselves, and in particular in human rights legal reasoning.

In the light of these preliminary observations, this chapter explains why we need to justify human rights (Section 2), what it means to justify them (Section 3), what the different justifications for human rights may be (Section 4), and, finally, what some of the implications of the justifications of human rights may be for other key issues in human rights theory (Section 5).

2 WHY JUSTIFY HUMAN RIGHTS

2.1 EXPLAINING JUSTIFICATION

Moral justification amounts to giving moral reasons for action or belief. In the legal context, moral justification is about understanding the point of the legal norms we have.¹²

Depending on one's moral theory, justifying may equate with 'founding', 'basing', 'deriving', or 'grounding'. As a matter of fact, those terms are used interchangeably by many authors.¹³ It is important to be cautious, however, especially if one wants to distance oneself from foundationalist approaches to morality. In short, foundationalism is a characteristic of those moral theories that claim there are foundations in morality and that hence attempt to derive moral values or entities from other foundational ones that are non-derivative.¹⁴

¹¹ Contrast Beitz (2009), or Raz, 'Human Rights in the Emerging World Order' (2010) 1 *Transnational Legal Theory* 31 with Griffin (2008), or Tasioulas, 'Towards a Philosophy of Human Rights' (2012) 65 *CLP* 1.

¹² eg Waldron (2013), on human rights; Waldron, *Dignity, Rank and Rights* (OUP, 2012) on dignity.

¹³ eg Tasioulas, 'The Moral Reality of Human Rights' in Pogge (ed), *Freedom from Poverty as a Human Right: Who Owes What to the Very Poor?* (OUP, 2007) 75; Griffin (2008).

¹⁴ See Nickel, *Making Sense of Human Rights* (Blackwell, 2007) ch 4; Waldron (2013).

There is nothing, however, in the enquiry into the justifications of human rights that necessarily implies foundationalism.

In the case of human rights, justifying implies giving reasons for human rights. Because human rights are grounds for duties in concrete circumstances, and hence reasons for action, justifying human rights comes close to providing an abstract justification for a further concrete justification. Abstract justifications of human rights may themselves be general or specific, depending on whether they pertain to all human rights or to some in particular. Considerations about the abstract justification of human rights as justifications for concrete duties that correspond to concrete human rights enable us to draw two key distinctions.

First, the justification of human rights should not be conflated with the *object* of human rights. It often is, however. This may be because the object of human rights is generally perceived as a normatively loaded question. Not everything can be protected by a human right, precisely because human rights justify duties. However, the object of a human right, that is, the concrete content of the duties corresponding to a specific human right, is identified by reference to the threats against which the right protects the interests of its holder in concrete circumstances and not abstractly. All the same, the equation of the justification and object is often made in pluralistic accounts of the justifications of human rights.¹⁵ Those authors argue for a plurality of justifications in order to match the plurality of objects of human rights. However, the reading proposed here is equally reconcilable with a monist approach to the justification of human rights. This would be the case in particular with an account that justifies human rights by reference to one single value such as dignity, but also understands that every particular right protects, and hence has as an object, something specifically required by dignity in a particular area. The loose relationship between the object and the justification of human rights also means that the correlation often made between the justification of human rights and their fundamental or intangible core (duties) is not a direct one. They are related, of course, and it will be explained how in this chapter, but not directly, and certainly not by reference to the object of the human right in question.

Second, and more generally, the justification of human rights should be carefully distinguished from other elements in the *moral structure* of human rights. Those elements are constitutive of any given human right in general and necessary for the recognition of a specific human right. They are, in a nutshell: the existence of an interest equally fundamental to all people, the existence of standard threats to that interest, the fair burden of the protection of the interest against those threats, and the abstract feasibility of that protection. Often, human rights theorists conflate some elements in the structure of human rights with their justification.¹⁶ This is particularly the case with interest-based accounts of human rights. In the interest-based approach, as opposed to the choice-based or will-based approach,¹⁷ human rights protect fundamental human interests that all human beings have. More precisely, a human right exists when a fundamental and general human interest is a sufficient reason to hold someone else (the duty-bearer) under a duty to respect that interest vis-à-vis the right-holder. Just as the choice-based approach does not necessarily mean that human rights are justified by autonomy, the interest-based approach does not imply that they are justified by reference to well-being. Of course, identifying interests as fundamental and general, threats as standard, and burdens as fair are matters of specific justification as well, but they are distinct from the general justification of human rights and can be established by analysis at a general level.

¹⁵ See eg Tasioulas (2009), critique of Griffin's autonomy-based account of human rights.

¹⁶ See eg Tasioulas (2012), on the dual root of human rights (interests and dignity).

¹⁷ See Waldron, 'Introduction' in Waldron (ed), *Theories of Rights* (OUP, 1984) 1, 9–12.

Furthermore, it is important not to conflate the justification of human rights with other connected endeavours.

First, the justification of human rights does not equate with their *history*. The former is normative, whereas the latter is descriptive. Of course, human rights theory and human rights history ought to inform each other to be successful in their respective projects.¹⁸ Not only because human rights history is also a kind of intellectual history, and hence the history of justifications, but also because human rights theory contributes to determining the object of human rights history and vice-versa. However, their aims and methods are clearly different.

Second, justifying human rights does not amount to explaining the *sources* of human rights. Their sources as legal norms are the sources of international human rights law, that is, treaties, customary international law, and general principles, as identified, specified, and interpreted by international judicial decisions.¹⁹ Of course, those law-making processes and their normative outcome may themselves be morally justified, and often will be, as their content may correspond to that of universal moral rights. However, this is not a condition for the validity of the corresponding legal norms. True, this is a resolutely legal positivist take on international human rights. Some, albeit presumably very few, natural law accounts of international human rights law may condition the legal validity of human rights on their moral justification.

Finally, justifying human rights does not amount to accounting for their *legitimacy*, and hence to justifying their authority. Admittedly, their legitimacy is not entirely distinct from their moral justification, to the extent that the reasons given by a legal norm should match pre-existing reasons of those subject to the law and depend on these pre-existing reasons. The search for the moral justification of human rights remains distinct from that of the legitimacy of international human rights law, however, even if the former will eventually inform the latter.

2.2 JUSTIFYING JUSTIFICATION

The next question is why we should care about justifying human rights.

The first argument lies in the nature of human rights as rights. Rights protect interests that are recognized as sufficiently important to give rise to duties. As normative relationships, they are grounds for reasons for action and are in themselves justifications as a result. Every time a right gives rise to specific duties in concrete circumstances, a justification is provided. This turns the law into a forum of justification for human rights duties. And this in turn requires a justification: the justification of abstract human rights themselves.

Second, the legality of human rights also explains why we should justify them. International human rights law does not provide external justifications of human rights, but makes it clear that we need to justify them. This is because of the relationship between law and morality generally, and in particular between the justifications for the law's authority and moral justifications. The justifications for the law's authority are content-independent and do not amount to moral justifications of the content of any given legal norm, but the reasons for action it gives have to match pre-existing moral reasons of those

¹⁸ Besson and Zysset, 'Human Rights History and Human Rights Theory: A Tale of Two Odd Bedfellows' (2012) *Ancilla Juris*, available at: <http://www.anci.ch/_media/beitrag/ancilla2012_204_besson.pdf>.

¹⁹ See Chapter 4. See also Besson, 'The Sources of International Human Rights Law' in Besson and d'Aspremont (eds), *Oxford Handbook on the Sources of International Law* (OUP, 2017) 837.

bound by it. This so-called dependence condition of legitimacy in turn implies that the law's content be also justified morally, not so much to be valid law but for the authority it claims ever to be justifiable.

Finally, international human rights law refers expressly to the independent existence of various moral justifications for human rights. It does so mostly in preambles to human rights instruments.²⁰ International human rights law invites us, therefore, to explore those justifications further.

Of course, justifications may themselves call for further justifications. Thus, one value may be given as a justification for something and itself be regarded as having to be justified. Usually, at this stage, alternatives for 'justifications of justifications' are suggested. The choice lies between either a metaphysical²¹ or religious²² route.²³ They are indeed the only ones able to provide these kinds of bedrock foundations. If neither approach is taken, however, there is no reason why the search for justification should be one for ultimate foundations and why a failure to identify those ultimate foundations should be a problem. The regress in the search for justifications has to halt at some stage. One may be satisfied with pausing at, for instance, equality or dignity without further justification and without searching for a master-justification or master-value. This may be because those moral values and principles are so widely accepted as part of people's moralities that one does not have to argue for them before using them to argue for human rights.²⁴

3 HOW TO JUSTIFY HUMAN RIGHTS

3.1 JUSTIFICATIONS OF MORAL AND LEGAL RIGHTS

Human rights mean different things to different people. Some regard human rights as rights in the strict sense, while others do not see them as rights beyond their name. And those who understand them as rights may conceive them as legal rights, as moral rights, or as both.

The moral justifications of human rights will differ significantly depending on how one understands them. For instance, there may be moral justifications of legal human rights that are distinct from the moral justifications of corresponding moral rights. One may consider that international human rights law is justified by reference to peace, independently of whether it entails rights in the strict sense, whether those are also moral rights, and whether they have separate justifications as such. Or one may justify international human rights law by reference to their specifying role of universal moral rights or to their entrenching a canonical version of them.²⁵

It is submitted here that we should understand the justification of human rights as a justification of rights, and of legal and moral rights at the same time. Further, as rights, human rights should also be regarded as grounds for duties, and hence their justification as a justification of a justification.

²⁰ eg UDHR, ICCPR, and ICESCR, preambles.

²¹ eg Habermas, 'The Concept of Human Dignity and the Realistic Utopia of Human Rights' (2010) 41 *Metaphilosophy* 464.

²² eg Waldron, *God, Locke, and Equality: Christian Foundations in Locke's Political Thought* (CUP, 2002) ch 3.

²³ See Tasioulas, 'Justice, Equality and Rights' in Crisp (ed), *The Oxford Handbook of the History of Ethics* (OUP, 2013) 768.

²⁴ See Nickel (2007), 61.

²⁵ eg Buchanan and Sreenivasan (2017); Buchanan (2015). See also Buchanan, *The Heart of Human Rights* (OUP, 2013) ch 2. For a discussion, see Luban, 'Response to Buchanan' in Cruft, Liao, and Renzo (2015), 263 ff.

First, human rights understood as *rights*. The practice of international human rights law treats human rights as rights. Of course, sometimes they go by other names such as principles or, at least, are applied as principles and not as subjective and claimable rights. In most cases, however, human rights legal, and especially judicial, reasoning is rights-based reasoning. In a practice-sensitive human rights theory like the proposed one, human rights ought, therefore, to be understood as rights.

Second, human rights understood as *legal and moral rights*. As rights guaranteed by legal norms, international human rights are clearly legal rights. The question is whether they also correspond to moral rights. Just as moral rights are moral propositions and sources of moral duties, legal rights are legal propositions and sources of legal duties. They are moral interests recognized by the law as sufficiently important to generate moral duties.²⁶ The same may be said of legal *human* rights: legal human rights are fundamental and general moral interests recognized by the law as sufficiently important to generate moral duties. Generally speaking, moral rights can exist independently from legal rights, but legal rights recognize, modify, or even create moral rights by recognizing certain moral interests as sufficiently important to generate moral duties. As such, legal rights are always also moral rights, whether by recognition (as such or with specification) of pre-existing moral rights or by creation of moral rights. Of course, there may be ways of protecting moral interests or even independent moral rights legally without recognizing them as legal rights. Conversely, some legal rights may not actually protect pre-existing moral rights or create moral rights, thus only bearing the name of rights and generating legal duties at the most. However, the same cannot be said of human rights. The universal moral rights that will become human rights create moral duties for institutions, and hence for the law as well, to recognize and protect human rights.²⁷ This is the only way to give them their central egalitarian dimension, and to assess, for instance, whether the interests and threats at stake are general and to specify and allocate the corresponding duties in an egalitarian fashion. In other words, human rights as a subset of universal moral rights are also of an inherently legal nature. The law makes universal moral rights human rights, either by recognizing them as legal rights or by creating them in recognition of certain fundamental universal moral interests. This understanding of the relationship between moral and legal human rights is one of mutuality. It goes beyond the traditional understanding of a one-way relationship of translation or enforcement of moral rights through legal rights.

Finally, human rights understood as *grounds for duties*. As normative relationships, human rights imply duties. There are three remarks one should make about the correlativity between human rights and duties. First, while human rights can be abstract, there can be no abstract human rights duties; since they may only be specified by reference to a concrete threat to the protected interest, they are always context-specific and concrete. As a result, a human right may be justified, recognized, and protected before specifying which duties correspond to it. This is what one may refer to as the justificatory priority of rights over duties.²⁸ Once a duty is specified, however, it will be correlative to the (specific) right. Second, a human right is a sufficient ground for holding duty-bearers under all the duties necessary to protect the interest against standard threats. It follows that a right might

²⁶ Raz, 'Legal Rights' (1984) 4 *OJLS* 1, 12; Raz (2010).

²⁷ See Raz, 'Human Rights without Foundations' in Besson and Tasioulas (eds), *The Philosophy of International Law* (OUP, 2010) 321.

²⁸ See MacCormick, 'Rights in Legislation' in Hacker and Raz (eds), *Law, Morality and Society: Essays in Honour of HLA Hart* (OUP, 1977) 189, 199–202; Raz, 'On the Nature of Rights' (1984) 93 *Mind* 194, 196, and 200.

provide for the imposition of many duties and not only one. This is what one refers to as the pluralism of human rights duties. Importantly, those duties will also evolve with time and place.²⁹ Third, therefore, human rights have a dynamic nature. As such, successive specific duties can be grounded on the same right depending on the circumstances. This application indeterminacy of rights also implies that rights need to be localized to be fully effective; it is only in local circumstances that the allocation and specification of duties can take place.

3.2 MORAL AND LEGAL JUSTIFICATIONS OF MORAL AND LEGAL RIGHTS

Moral justifications of human rights ought to be distinguished from legal justifications of human rights as legal rights, that is, justifications entirely internal to the law.

Moral justifications of human rights are moral justifications of those rights as moral and/or legal rights. Depending on whether it is the moral or the legal dimension of human rights that is justified, different moral justifications may be proposed. The justifications of human rights that matter are those that pertain to human rights in general, that is, human rights as moral *and* legal rights.

Moral justifications of human rights as moral and legal rights may be articulated, in an ideal fashion, as external moral justifications. This is what most human rights theorists have done so far.³⁰ They treat justifications as a basis for the 'top-down' derivation of human rights. However, in a theory of human rights that takes their legal dimension seriously it is important to assess the moral justifications that one finds embedded in the legal practice of human rights. As explained in the introduction to this chapter, moral justifications and critiques of human rights are inherent to human rights law and legal reasoning. It is this kind of law-immanent and internal moral justification that is relevant to accounting for human rights practice and explaining its point from within.

The best way to capture the moral justifications of human rights present in legal practice in a 'bottom-up' fashion is to focus on human rights legal reasoning and in particular on the interpretation, especially judicial interpretation, of human rights. This kind of justification of human rights is normative in kind and cannot be reduced to some kind of descriptive account of human rights practice. The legal practice of moral justification of human rights is considered in this section with respect to two main justifications that are brought forward, namely equality and dignity.

Last but not least, one should emphasize that human rights do not exhaust morality. As a result, their justifications do not either. They may, therefore, conflict with those of other moral and legal norms. One may think of considerations of justice or democracy that often conflict with human rights whatever their justifications. For instance, the protection of specific human rights, such as the right to property, may conflict with concerns of distributive equality in practice. This explains how human rights are wrongly accused of epitomizing moral individualism at any price. It is quite the contrary actually, as they have to be interpreted in the broad context of morality, including by reference to the collective dimensions of morality.

²⁹ See Beitz and Goodin (eds), *Global Basic Rights* (OUP, 2009) 10.

³⁰ eg Nickel (2007); Griffin (2009); Tasioulas (2012); Wellman (2011). Note that some have done so taking as their object human rights as moral rights, as legal rights, or as both.

4 WHICH JUSTIFICATIONS FOR HUMAN RIGHTS

4.1 A PLURALITY OF JUSTIFICATIONS

Moral justifications of human rights may be of various types, and a few clarifying distinctions are in order.

The first distinction is between *religious* and *non-religious* justifications of human rights. It follows from the structure of human rights presented in Section 2 that human rights protect fundamental human interests. Of course, this does not exclude providing religious justifications of human rights.³¹ As a matter of fact, religious approaches often converge on the same list of rights as secular ones. It suffices to think here of the right to life or freedom of religion. It is key, however, that the interests protected be humanistic interests, that is, interests that individuals have as human beings, and not extra-human concerns including the will of God.³² In this section, and for reasons that pertain to the antecedence of morality over religion,³³ the focus will be on non-religious justifications of human rights.

A second distinction opposes *prudential* justifications of human rights to *objective* ones. Prudential reasons are reasons relating to a person's own prospects for a good life and what is in his or her subjective interest as a result. Prudential reasons for human rights may be, for instance, that human rights contribute to making society safer both for individuals and for the group. Focusing on prudential reasons for human rights is attractive because their existence confirms that the feasibility of human rights ought to matter for their justification, and that their cost is not too high for our societies. In addition, they confirm that there are psychological patterns in place to support those rights in practice. Those reasons also demonstrate the importance of the collective dimension of human rights, and that it is necessary to factor this into any justification of human rights whether prudential or not. However, there are various difficulties with prudential justifications of human rights. One is their relativity, and the problem this creates when accounting for the universality of human rights. Another one is the instability of these justifications when majorities and power shift. In the remainder of this chapter, I will focus on objective justifications of human rights, that is, those arguments that appeal directly to what is reasonable from the interpersonal moral point of view. Again, of course, many prudential reasons for human rights may correspond to those objective justifications.

Third, among objective justifications of human rights, it is useful to distinguish *consequentialist* justifications from *non-consequentialist* ones. Consequentialist justifications refer to results and support human rights because they make the societies that respect them more peaceful or prosperous. A common example may be utilitarian justifications, according to which human rights are justified by reference to their consequences for the general welfare.³⁴ The main difficulty with utilitarian justifications of human rights lies in their quantitative approach: human rights, and their corresponding duties, are regarded as commensurable and as having to be balanced against considerations of utility or other human rights, with the potential consequence of justifying grave restrictions to certain human rights or even emptying them of their whole purpose by reference to the general welfare. This contradicts an important dimension of human rights in practice: their

³¹ eg Perry, *Toward a Theory of Human Rights: Religion, Law, Courts* (CUP, 2006).

³² See Buchanan, *Justice, Legitimacy, and Self-determination: Moral Foundations for International Law* (OUP, 2004) 130–1, 141–2.

³³ See Dworkin, 'Religion without God' (2013) 60 *NY Review of Books*.

³⁴ eg Talbott, *Human Rights and Human Well-Being* (OUP, 2010).

demanding normative nature and their alleged resistance to trade-offs. In this section, therefore, the focus will be on non-consequentialist, that is deontological, justifications of human rights. Of course, this does not exclude convergence with consequentialist considerations, and in particular the importance of paying due attention to the egalitarian, and hence collective, dimension of human rights.

Finally, among non-consequentialist justifications, one may distinguish between *instrumental* and *inherent* justifications. Instrumental justifications account for one human right by reference to its relationship to others, thus making the former a more fundamental right. Certain human rights are regarded as being instrumental to others when they are necessary to their effective implementation or enjoyment. One may think here of the human rights to security and subsistence and their necessity to the enjoyment of other human rights.³⁵ This is sometimes referred to as a linkage argument or a derivative justification for human rights. The supportive relationship between human rights may be unilateral or mutual.³⁶ Either way, it may be more or less strong depending on how important it is to the effective implementation of other rights in practice. Importantly, the instrumental justification needs to be assessed in the abstract when first justifying another human right. However, there are difficulties with the idea of instrumental justification of some human rights. One may mention, for instance, its all or nothing consequences for every given human right, and the indeterminacy of instrumental justifications at the abstract level of rights. In any case, no further conclusions may be drawn as to the abstract priority of non-instrumentally justified rights over instrumental ones.³⁷ Indeed, all human rights are equal and relationships among their justifications should not affect their relationships. This argument will be returned to in the context of the discussion of the stringency of human rights, but for now the focus should be on inherent justifications of human rights.

The next question is whether one should try to identify a single justification and defend a monist account of the justification of human rights or whether a pluralistic account is more plausible. Among the arguments put forward in favour of a single justification, one may mention the holistic approach to humanity or, better, moral personhood, and in particular the indivisibility of that basic moral status. In reply, one may stress not only the pluralism that characterizes morality, but also the plurality of the corresponding dimensions of moral personhood and hence presumably of moral justifications of the rights that correspond to those dimensions of personhood. Furthermore, the more justifications for human rights are identified, the more one enhances their potential subjective or psychological legitimacy or acceptance. It is important to emphasize that one should differentiate between justifications articulated as such and those reached through overlapping consensus.³⁸ Not endorsing the latter and focusing on the former kind of justifications does not mean, however, that we should not be concerned with the degree of subjective recognition of the proposed objective justifications of human rights.

³⁵ See Nickel (2007), 87–90; Shue, *Basic Rights: Subsistence, Affluence and US Foreign Policy* (Princeton UP, 1996) 11.

³⁶ When the linkage between human rights is strong and mutual, one may speak of indivisibility of human rights: eg Nickel, 'Rethinking Indivisibility: Towards a Theory of Supporting Relations between Human Rights' (2008) 30 *HRQ* 984.

³⁷ See Waldron, 'Security as a Basic Right (After 9/11)' in Beitz and Goodin (eds), *Global Basic Rights* (OUP, 2009) 207.

³⁸ eg Cohen, 'Minimalism about Human Rights: The Most We Can Hope For?' (2004) 12 *J of Political Philosophy* 190. For a critique, eg Beitz (2009); Forst, 'The Justification of Human Rights and the Basic Right to Justification: A Reflexive Approach' (2010) 120 *Ethics* 711.

Of course, defending a pluralist account of the justification of human rights means that there could be conflicts between those justifications themselves, and not only between human rights duties. The connection between the two issues is discussed in Section 4.2. It suffices here to recognize that pluralism and the possibility of conflict in justifications of human rights are a quality of one's human rights theory, and in particular of its ability to account for the pluralist practice of human rights.

4.2 TWO POTENTIAL JUSTIFICATIONS

The two moral grounds most commonly advanced for human rights are equality and dignity. Many other potential justifications could be mentioned, in particular autonomy and fairness. As pluralistic approaches to the justification of human rights are more promising, I will not address equality and dignity's virtues as monistic or sole justifications of human rights.

Equality and dignity constitute status-related justifications of human rights. This focus on status-related justifications should not be mistaken for a rejection of an interest-based approach to human rights. A basis in interests or status does not imply a justification only in interests or status. The moral structure of human rights endorsed in Section 2 regards human rights as based on objective interests. However, interests are part of the moral structure of human rights and do not justify them. Even if human rights are not status-based, they may be justified by reference to status. Human rights are constitutive of a status and that status amounts to those human rights in return. Human rights cannot, therefore, be based on that status, even though they are justified by reference to that status. It is the underlying idea informing that status and explaining how different rights constitute that status, and not the status itself, that justifies the rights constitutive of the status, whether it is equality or dignity.³⁹

4.2.1 Equality

Human rights are sometimes justified by reference to equality, and in particular thin or basic moral equality. Basic moral equality is usually referred to as equal moral status.

The concept of equal moral status is best explained by distinguishing the notion of moral status from that of *equal* moral status. In a nutshell, *moral status* pertains to the way in which a being is subject to moral evaluation, how it ought to be treated, whether it has rights, and what kind of rights it has.⁴⁰ Moral status goes further, therefore, than mere moral considerability: the latter is a standing that may be shared with many other sentient animals and even with things, whereas moral status only belongs to human beings. *Equal moral status* refers to the idea that 'all people are of equal worth and that there are some claims people are entitled to make on one another simply by virtue of their status as persons.'⁴¹

There are two, inseparable core ideas in this understanding of equal moral status: the idea that all persons should be regarded as having the same moral worth, and the idea that this equal moral worth is relational and the basis for mutual moral claims. The first core idea in equal moral status pertains to the inherent and non-instrumental value of personhood. According to that idea, no person may be deemed as morally inferior to another: all those who have the characteristics that are sufficient for being a person, and hence the capacity for rational and moral agency, have the same moral status.⁴² Equal moral status is of course compatible with important inequalities on other counts such as health, beauty,

luck, etc. It is important to stress that what matters here is personhood and not human nature. The former captures what ought to be protected morally in human beings as moral agents, and it escapes the naturalistic fallacy and many other misconceptions that come with the notion of human nature. The second core idea in equal moral status pertains to its relational dimension. One is at once a person valuable in him- or herself and a person equal to others, that is, a person whose status and moral worth is defined by one's moral relations to others. The relational or social nature of equal moral status explains why the latter amounts to more than mere autonomy or rational capacity that is covered by the first core idea.⁴³ The denial of equal moral status amounts to a judgment of exclusion and inferiority to others where this kind of judgment is 'thought to disqualify one from participation as an equal in important social practices or roles'.⁴⁴

As a result, equal moral status does more than simply entitle persons to mutual claims. It is *defined* by reference to those mutual claims. The mutual entitlements inherent in equal moral status are usually described as mutual basic moral rights.⁴⁵ Human rights are among the mutual basic moral rights that constitute one's equal moral status, although they may not exhaust them. What these basic moral rights or entitlements amount to are rights or entitlements to equal treatment or respect in a broad sense. This relationship between equal status and rights explains how human rights protect only those interests that can give rise to mutual entitlements that are themselves constitutive of equal moral status, with that status itself amounting to those mutual entitlements in return. This is why human rights cannot be said to be 'grounded' in (political) equality, even though the latter can be a 'ground' or justification for the recognition of human rights⁴⁶ and human rights a 'ground' for the recognition of equal (political) status.

Political equality is indeed the kind of equality that matters in a legal order and, accordingly, in the context of human rights law. The passage from equality to political equality corresponds to that from basic moral rights to human rights. The relational or social nature of equal moral status alluded to before implies that 'the proper acknowledgement of a person's moral status requires some sort of fundamental public recognition of equality'.⁴⁷ Political, or public, equality implies that people can see that they are being treated as equals and takes the form of its recognition by the law and institutions. The political dimension of equal moral status leads to a further process: the struggle for equal participation rights. And this in turn implies struggling for the establishment of a democratic regime that includes all those subjected to a decision into the decision-making process. Democracy is indeed the way 'of publicly realizing equality when persons who have diverse interests need to establish rules and institutions for the common world in which they live',⁴⁸ in spite of persistent and widespread reasonable disagreement.

It is precisely in the equal political status of each individual as an equal member of the moral-political community that the threshold of importance and point of passage from a general and fundamental interest to a human right may be found. Only those interests that are recognized as sufficiently important by members of the community can

³⁹ See Waldron (2013).

⁴⁰ See Buchanan, 'Moral Status and Human Enhancement' (2009) 37 *Philosophy and Public Affairs* 346.

⁴¹ Scheffler, 'What is Egalitarianism?' (2003) 31 *Philosophy and Public Affairs* 5, 22.

⁴² See Buchanan (2009), 347.

⁴³ See Anderson, 'What is the Point of Equality?' (1999) 109 *Ethics* 287, 288–9 and 313.

⁴⁴ Buchanan, 'The Egalitarianism of Human Rights' (2010) 120 *Ethics* 679, 708–10.

⁴⁵ See Buchanan, *Beyond Humanity?* (OUP, 2011) 233.

⁴⁶ See on dignity, Waldron (2013). See also Besson, 'The Egalitarian Dimension of Human Rights' (2013) 136 *Archiv für Sozial- und Rechtsphilosophie Beiheft* 19.

⁴⁷ Buchanan (2009), 379.

⁴⁸ Christiano, 'Democratic Legitimacy and International Institutions' in Besson and Tasioulas (2010), 119, 121–2.

be recognized as giving rise to duties and hence human rights. Each person's interests deserve equal respect by virtue of his or her status as member of the community and of his or her mutual relations to other members of the community. As a result, the recognition of human rights does not occur in a top-down fashion; they are not externally promulgated but mutually granted by members of a given political community.⁴⁹ This is particularly important as it allows for the mutual assessment of the general and standard nature of the threats to certain interests that, therefore, deserve protection, on the one hand, and of the burdens and costs of the recognition of the corresponding rights and duties, on the other. As a matter of fact, human rights are not a consequence of individuals' equal political status, but a way of earning that equal status and consolidating it. Without human rights, political equality would remain an abstract guarantee; through mutual human rights, individuals become actors of their own equality and members of their political community. Borrowing Hannah Arendt's words: 'we are not born equal; we become equal as members of a group on the strength of our decision to guarantee ourselves mutually equal rights.'⁵⁰

Evidence of the egalitarian dimension and justification of human rights may be found in practice. One may think, for instance, of the non-inherently individualistic nature of human rights that protect basic individual interests deemed comparatively important within the political community. Some human rights, like freedom of expression, protect individual interests in collective goods or individual interests whose social importance is part of the reason to protect them as individual rights. The egalitarian dimension of human rights is also echoed in the idea of an inviolable core of human rights as a limit on restrictions to the enjoyment of human rights. Contrary to the standard inviolability approach to that core,⁵¹ on the proposed account, each human right is based on an interest (rather than a status) that is deemed, when protected as a right, as fundamental and constitutive of one's political equality, and, as a result, status. What is inviolable is not the interest, but the fact that everyone ought to benefit from its protection and hence from the right to have rights that protect it.

4.2.2 Dignity

Dignity is sometimes invoked as another way of justifying human rights.⁵² The problem is that dignity is an extremely indeterminate and historically complex concept, often used as placeholder in morality.⁵³

It remains unclear, for instance, whether dignity does some work in the human rights context that equal moral status cannot do. To start with, authors use dignity to refer to what is unique in human beings and shared by all of them: their personhood and capacity for rational and moral agency. This is, however, the very idea captured by the concept of equal moral status.⁵⁴ Another important element about dignity as it is used in the human rights context is its comparative or relational dimension. However, the fact that authors usually use the term 'equal dignity'⁵⁵ to describe this dimension shows how the question

⁴⁹ See Forst (2010).

⁵⁰ Arendt, *The Origins of Totalitarianism* (Penguin, 1951) 147.

⁵¹ eg Kamm, 'Rights' in Coleman and Shapiro (eds), *The Oxford Handbook of Jurisprudence and Philosophy of Law* (OUP, 2002) 476; Nagel, 'La valeur de l'invulnérabilité' (1994) 99 *Revue de métaphysique et de morale* 149.

⁵² eg Waldron (2012); Habermas (2010); Forst (2010); Habermas, *Zur Verfassung Europas: Ein Essay* (Suhkamp, 2011); Tasioulas (2012).

⁵³ eg Pinker, 'The Stupidity of Dignity', *The New Republic* (28 May 2008).

⁵⁴ This becomes clear when one looks at Habermas (2010), 468–9 and 472.

⁵⁵ eg Gosepath, 'The Place of Equality in Habermas' and Dworkin's Theories of Justice' (1995) 3 *EJ of Philosophy* 2, 27.

of equality cannot be escaped by gesturing to dignity. Confirmation that 'equal dignity' is redundant if one adopts the proposed approach to equal moral status as equal universal moral rights may be found in Article 1 of the Universal Declaration of Human Rights that refers to human beings being born 'equal in dignity and rights'.⁵⁶

If this argument against dignity as a foundation of human rights holds, one still needs to explain why dignity has been a key feature within major international and domestic human rights law instruments since 1945.⁵⁷

An historical explanation is the post-Second World War political convergence of two extremely powerful traditions: Christian theology and Kantian philosophy.⁵⁸ Yet historical compromises do not necessarily make for good moral interpretations of law, and historical understandings do not necessarily stick in judicial interpretations of legal norms. As to the resurgence of interest in dignity these days, explanations are easy to find. Legal reasons may lie in the development of comparative constitutional law, and the influence of German constitutional law (where dignity is a central concept) in that context, but also within EU fundamental rights law and international human rights law. Morally, one may find explanations in the return of the religious or at least of the sacred, but also in the coming under threat of Kantian moral philosophy within moral philosophy in general. Those debates within morality ensure that the fascination for dignity can endure. And this may not necessarily be a regrettable state of affairs given the role such essentially contestable concepts play in a democratic legal order. Besides, if dignity works as a moral placeholder and 'status-indicator',⁵⁹ then its resilience may be good news for the protection of equal moral status and human rights.

All of this is not to say, of course, that dignity does not have a moral existence of its own besides equal moral status, but merely that it is redundant to equal moral status in its relationship to human rights. Dignity is a way to be treated. That meaning of dignity corresponds to the idea of being treated with dignity or dignified respect. It usually takes the shape of a duty to dignified treatment, as opposed to a right.

5 WHAT FOLLOWS FROM THE JUSTIFICATION OF HUMAN RIGHTS

5.1 HUMAN RIGHTS JUSTIFICATIONS AND THE UNIVERSALITY OF HUMAN RIGHTS

The justifications of human rights have to be such that they can account for the claim to universality of human rights, or, at least, provide an explanation of why that claim is made in practice.

A well-known challenge to the legitimacy, but also to the moral justification, of the universality of international human rights law is based on a brand of moral relativism. In

⁵⁶ Emphasis added.

⁵⁷ eg McCrudden, 'Dignity and Judicial Interpretation of Human Rights' (2008) 19 *EJIL* 655; McCrudden, 'In Pursuit of Human Dignity: An Introduction to Current Debates' in McCrudden (ed), *Understanding Human Dignity* (OUP, 2013). Of course, there are also counter-arguments in international and domestic human rights practice, as not all constitutional traditions know dignity, and some have now abandoned it.

⁵⁸ See Rosen, *Dignity: Its History and Meaning* (Harvard UP, 2012) 53, 80 ff and 90 ff. See also Moyn, *Christian Human Rights* (UPenn Press, 2015).

⁵⁹ Ladwig, 'Menschenwürde als Grund der Menschenrechte' (2010) 1 *Zeitschrift für Politische Theorie* 51, 65. See also Habermas (2010), 26; Beitz, 'Human Dignity in the Theory of Human Rights: Nothing But a Phrase?' (2013) 41 *Philosophy & Public Affairs* 259, 288.

short, the objection is that international human rights law embodies a 'parochial' (that is, limited or narrow) set of values (or ordering of such values) that it unjustifiably imposes through its claim to a universal personal scope, on people and societies who do not share it. If one refers to the conditions of justified authority or legitimacy in Joseph Raz's conception of authority (that is, the dependence condition and the normal justification condition),⁶⁰ the claim made by parochialism is that international law does not have legitimate authority over certain subjects of international law. The parochialist complaint can be read as denying that international law facilitates conformity with pre-existing objective reasons, as opposed to the reasons asserted by certain dominant groups. In other words, parochialism denounces the legitimacy of international law for disregarding the dependence condition.

There are three ways of understanding the moral relativist challenge: moral relativism in the strict sense, epistemological relativism, and social relativism. One may assume here that the parochialism objection is not based on a sceptical view of morality.⁶¹ In respect of the first challenge, *moral relativism in the strict sense*, it may be pointed out that adopting an objective view of morality does not equate with adhering to a single conception of morality. The background to the present analysis is an objective, albeit pluralist, account of morality that can accommodate conflicts of values and different orderings between them. As to the second challenge, *epistemological relativism*, one may legitimately contend that the institutionalized intercultural dialogue and mutual adjustment promoted by democratic coordination in international human rights law-making, and international human rights decision-making generally, could pay sufficient attention to the issue of the diversity of perspectives and understandings when adopting or applying international human rights law.⁶² Finally, with regard to the third challenge, that of *social relativism*, it should be emphasized that holding to moral objectivity does not mean denying the importance of the contextualization of moral values recognized by international human rights law at the domestic level, nor the possibility of the historical national localization of objective values and of historical changes in that localization over the course of time.⁶³ This is particularly appropriate in the context of human rights where duties can only be specified in a concrete political and, in particular, democratic context. In short, parochialism is a necessary component of human rights enforcement that requires contextualization and hence some form of vernacularization or adaptation to the local circumstances.⁶⁴

It seems, therefore, that the difficulties raised by moral, epistemological, and social relativism can be adequately met. However, the critique based on moral relativism retains some of its original bite when it is understood as based on moral pluralism. This version of the challenge relies on the absence of correspondence between the basic values or reasons or, more often, their orderings or rankings imposed by international human rights norms, and those applying

⁶⁰ Raz, *The Morality of Freedom* (Clarendon, 1986); Raz, *Ethics in the Public Domain* (Clarendon, 1995).

⁶¹ Defeating a moral relativist objection would take us beyond the scope of this chapter. It is clear, however, that reasonable moral disagreement does not validate a moral relativist argument (see Griffin (2009), 128–32). Nor actually does reasonable moral agreement validate a moral realist one. Acceptability and acceptance are deeply parochial. This is why, for instance, the legal universality of human rights may not be proposed as a solution to the problem of human rights parochialism, but is at its source.

⁶² See Buchanan (2004); Buchanan, 'Human Rights and the Legitimacy of the International Legal Order' (2008) 14 *Legal Theory* 39.

⁶³ See Williams, *In the Beginning was the Deed: Realism and Moralism in Political Argument* (Princeton UP, 2005) 62, 66.

⁶⁴ See also Buchanan (2004); Merry, *Human Rights and Gender Violence: Translating International Law into Local Justice* (University of Chicago Press, 2006); Benhabib, 'The Legitimacy of Human Rights' (2008) 137 *Daedalus* 94.

within any given political community. One may think, for instance, of collectivist moralities that give the group priority over the individual. This objection affects the plausibility of universal moral justification of international human rights law and cannot simply be put at rest by reference to the piecemeal or fragmented nature of the legitimate authority of international law. If successful, the challenge would preclude a whole set of international human rights, albeit abstract rights, from applying to a whole range of cultures (regions and countries).

Despite appearances, the moral pluralism objection can also be met. The situation differs, however, depending on the state and its existing level of human rights protection.

Those states that do not have domestic human rights norms do not yet have the duties that correspond to those rights. What they have, however, is a moral duty to protect fundamental universal interests and this ought to be done by recognizing those interests as human rights. In such cases, the dependence condition is met because the reason corresponding at least to the right to have rights is pre-existing. However, the other reasons corresponding to international human rights duties cannot match pre-existing state reasons. Thus, the inescapable parochialism of political equality that only exists within the bound of a given political community and that is hence ingrained in human rights defeats the universal justification and legitimacy of international human rights law, just as it conditions their very legalization as human rights in the first place. With respect to the right to have rights, in any case, it is important to work on substantive and institutional mechanisms of deliberation and inclusive transcultural dialogue that increase the epistemic virtues of international human rights law-making and can, therefore, minimize the discrepancies in the ordering of interests and of reasons between international human rights norms and domestic ones.

If, by contrast, a state already has a set of corresponding domestic human rights norms, the reasons stemming from those human rights duties can be matched by the reasons given by international human rights norms. It is the specific ordering of interests and reasons that may differ, however, in circumstances of moral pluralism. Given what was said before about the interdependence between human rights and political equality and given the role of the political community and hence of domestic law in identifying the egalitarian threshold of importance of those interests that need to be protected as human rights, international human rights norms are drafted as minimal and abstract legal norms. Their threshold may then be set higher by domestic law. Their ordering with other interests that is necessary to further specify the rights and identify the corresponding duties may depend on the contextualization made by domestic authorities. Since most of the legalization of human rights takes place at domestic level, this also makes domestic law the locus of justification and hence legitimization of international human rights norms.

International human rights law accommodates moral pluralism, in other words, by not forcing complete orderings of the same values. This minimizes the chances of disconnect between the ordering of interests in international human rights norms and states' pre-existing reasons for action. It should be added that the egalitarian justification of human rights proposed before grants human rights a relational and collective dimension that goes part of the way in accommodating collectivist and non-individualistic moralities and hence moral pluralism within human rights.

5.2 HUMAN RIGHTS JUSTIFICATIONS AND THE STRINGENCY OF HUMAN RIGHTS

The justifications of human rights have to be such that they can account for the special stringency and demanding normative nature of human rights in practice, but also provide an explanation of why and how they are being restricted in case of conflict with other moral considerations or other human rights.

It is commonly expected that human rights weigh as much as their justification and thus that conflicts between rights should be resolved by reference to that weight. This is, for instance, what many status-based approaches to the justification of human rights claim.⁶⁵ Those who defend the idea of a minimal core in every human right that is resistant to trade-offs also usually relate its special stringency to that of the justification of the human right (for example dignity). Other accounts that endorse linkage approaches to the justification of certain human rights see their priority in case of conflict as conditioned by whether they are instrumental rights or not.⁶⁶

Things are not that straightforward, however. Human rights do not have a certain weight that may be quantitatively balanced and traded off like utility, but are described and relate by reference to their moral stringency. Actually, it is the concrete duties that have that stringency and not the abstract rights. And the different duties corresponding to any given human right may have very different stringencies depending on the threats against which they are shielding the protected interest. As a result, human rights should not be weighed and balanced quantitatively when they conflict with other rights or moral considerations, but their duties' respective and variable stringency should be assessed to reach a qualitative trade-off.

No wonder then that the stringency of human rights is only indirectly related to their moral justification. This dispels the apparent paradox that besets human rights theory according to which it is hard to understand why human rights justified by reference to extremely stringent values can be restricted on the basis of conflicting public interests and less stringent moral considerations, on the one hand, or how human rights that are equal in justification may have to be weighed and balanced against each other, on the other.⁶⁷ It is true that all equally justified human rights are equal in the abstract and have very stringent justifications, but this does not mean that their corresponding duties are of equal stringency and may not be restricted in a differentiated fashion. Nor does it mean that they may be restricted to any degree, however. They may be restricted, but in a manner that is justified by reference to the underlying justification of human rights.

The specific stringency of human rights pertains to the ranking or priority of human rights when they conflict with other moral considerations. It is part of the meaning of human rights that they should have a relationship of priority over certain other moral considerations. Human rights are often portrayed as resistant to 'changes on the scale of social costs'.⁶⁸ This was famously captured by Ronald Dworkin's idea of rights as trumps,⁶⁹ Robert Nozick's conception of rights as side-constraints,⁷⁰ or John Rawls' idea of lexical priority.⁷¹

The first question, however, is whether human rights should take priority over any other moral considerations or just some of them. Other moral considerations may include, depending on the accounts, moral interests, values, interests, goods, welfare, justice, utility, security, and so on. It may be useful to refer to Dworkin's idea of rights as trumps, as he is very careful when identifying the considerations he has in mind. His idea is to exclude merely external preferences, that is, others' preferences about how one should lead one's own life.⁷² His argument for that exclusion is egalitarian. Rights should be invoked in cases

⁶⁵ eg Kamm (2002); Nagel (1994).

⁶⁶ eg Shue (1996); and a critique by Waldron (2009).

⁶⁷ eg Griffin (2009), 76: 'Human rights are resistant to trade-offs, but not completely so'.

⁶⁸ See Waldron, 'Security and Liberty: The Image of Balance' (2003) 11 *J of Political Philosophy* 191, 196.

⁶⁹ Dworkin, *Taking Rights Seriously* (Harvard UP, 1977) 190 ff.

⁷⁰ Nozick, *Anarchy, State and Utopia* (Basic Books, 1974) 28 ff.

⁷¹ Rawls, *The Law of Peoples* (Harvard UP, 1999) 36 ff.

⁷² See Dworkin, 'Rights as Trumps' in Waldron (ed), *Theories of Rights* (OUP, 1984) 153, 165. See also Waldron, 'Rights in Conflict' in *Liberal Rights: Collected Papers* (CUP, 1993) 203, 220–1.

where invocations of the common good or the general interest of the community are likely to have been contaminated by those external preferences and the latter granted more importance than they should as a result.

The next question pertains to the degree of stringency of human rights duties when they enter in relation with other moral considerations and to whether their stringency is absolute or not. Here again, Dworkin's account is helpful as he does not preclude that, in some cases, some of the considerations *a priori* excluded from restricting human rights may be allowed to restrict them.⁷³ This is why some authors have referred to Dworkin's account as one that treats rights as 'shields' rather than trumps.⁷⁴ There are two ways in which this conclusion seems plausible. The first one pertains to the plurality of human rights duties at any given time and over time. Depending on the circumstances and the kinds of threats to the interest protected by the human right, different duties corresponding to the same right may be of different stringency, at least relatively to one another. The second one is that not all moral considerations that may be conflicting with human rights duties are of the same stringency. Some may be more stringent than others, depending on the circumstances.

The question, however, is how to structure the relationship between those moral considerations that are not trumped by human rights and the idea of human rights that work as trumps over moral considerations. As Jeremy Waldron argues, the answer cannot lie in any quantitative assessment of the interest protected as this would bring back the dangers of the utilitarian weighing and balancing of interests.⁷⁵ The same may be said of any quantitative measurement of the degree of threat to the interest protected. The logic of the idea of weight would indeed suggest that ultimately any human rights duty associated with that interest may be dealt with in that way.

The answer to this dilemma lies arguably in the collective dimension of the interests protected by human rights and, more specifically, their egalitarian dimension. These two features are internal to human rights as rights and enable them to relate to other interests and moral considerations in their own way and within their specific moral category without threatening the special stringency of that moral category in general.⁷⁶

First, the collective dimension of some of the individual interests protected by human rights provides guidance as to how qualitative trade-offs may be operated and this within the rights themselves. Human rights are normative relations and have a socio-comparative dimension that incorporates a given relationship between the individual and the group. Thus, one may imagine that the collective dimension of the interest protected by freedom of expression in a democracy, that is, its contribution to political life, may allow for justified restrictions of some of its corresponding duties in circumstances where that collective dimension requires them. The role of the collective dimension of any given human right is precisely to help draw the line between what is collectively necessary in the protection of a right and what is not.

Second, the egalitarian idea underlying all human rights calls for egalitarian justifications of restrictions to human rights duties. All restrictions of human rights should be egalitarian, implying, for instance, that attention is paid to the distributive consequences of restrictions: the losers should not always be on the same side. The egalitarian justification of human rights also explains why the restriction of human rights duties by reference to other moral considerations may never lead to the complete erosion of any one of them or to the restriction of their fundamental core.⁷⁷ This would amount to denying equal rights-holders their

⁷³ See Dworkin (1984), 191.

⁷⁴ See Schauer, 'A Comment on the Structure of Rights' (1993) 27 *Georgia LR* 415, 429.

⁷⁵ Waldron (1993), 216 ff.

⁷⁶ See Besson, 'Human Rights in Relation' in Smet and Brems (eds), *Human Rights Conflicts* (OUP, 2017) 23.

⁷⁷ See Waldron (2009), 224–6; Shue (1996), 114, 166.

equal rights and their equal moral status as members of the political community. Finally, in institutional terms, this egalitarian requirement of human rights restrictions also implies that democratic procedures are the adequate procedures in which to justify human rights restrictions. This is why most international and regional human rights instruments include a reference to democracy in the justification test they apply to human rights restrictions.

6 CONCLUSION

Human rights need to be justified, not least because they have been under critique lately. The purpose of this chapter was to explain what the justification of human rights amounts to, why it is necessary, how we should go about it, and what its implications are.

Of course, as it should have become clear in the course of the argument, the justification of human rights is so central to human rights theory that it is conditioned by, and conditions in return, other key issues in human rights theory. Those are not only the nature, object, scope, rights-holders, and duty-bearers of human rights, but also what we understand the project of human rights theorizing itself to be.

FURTHER READING

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|---|---|
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Stanford Encyclopedia of Philosophy: <<http://plato.stanford.edu>>
 Routledge Encyclopedia of Philosophy: <<http://www.rep.routledge.com/>>

3

CRITIQUES

Marie-Bénédicte Dembour

SUMMARY

Whether they are conceived as the rights that every human being has, thus 'naturally' setting limits to the legitimate action of states and others, or as principles of good political action which society agrees to adopt and follow, human rights have always been subjected to intense and perceptive critiques. This chapter reviews six such critiques, deriving from realist, utilitarian, Marxist, particularist (cultural relativist), feminist, and post-colonial theoretical perspectives. The first three critiques emerged in reaction to the (successive) French Declarations of the Rights of Man of the late eighteenth century; the last three were fully developed in reaction to the International Bill of Rights enacted after the Second World War. Each of these critiques reveals a gap between what human rights claim to be or achieve, on the one hand, and what human rights are or do in practice, on the other. The question arises as to whether this gap is bridgeable. The critiques answer this question in various ways.¹

1 INTRODUCTION

Human rights, for those who believe in them, embody the promise of a better world. They are, in Samuel Moyn's words, the current 'last utopia'.² From the late 1970s, they became the language in which to articulate high moral precepts in the political sphere, and they displaced alternative utopias. However, the concept of human rights—and of its antecedent, natural rights—has always attracted persuasive critiques. This chapter reviews six critiques, emanating respectively from realist, utilitarian, Marxist, particularist (cultural relativist), feminist, and, finally, post-colonial theoretical perspectives.

Before understanding a critique, the concept it is critiquing first needs to be understood. This is not the context, however, to discuss in detail what human rights are.³ Suffice it to say here that this chapter is written with the understanding that human rights orthodoxy has been moving from conceiving human rights as a given ('natural school') to conceiving them as values and principles which are agreed upon ('deliberative school'). For ease of terms, the natural school will be referred to as the 'old orthodoxy' and the deliberative

¹ Parts of this chapter draw upon *Who Believes in Human Rights?: Reflections on the European Convention*

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² Moyn, *The Last Utopia: Human Rights in History* (Harvard UP, 2010).

³ But see Chapter 2.